

**ORIGINAL  
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CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
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THE UNIVERSITY OF TEXAS,  
DALE E. KLEIN,  
LARRY R. FAULKNER,  
SHELDON EKLAND-OLSON,  
BEN G. STREETMAN,  
NEAL E. ARMSTRONG,  
SHELDON LANDSBERGER and  
J. PARKER LAMB,  
*Defendants.*

CIVIL ACTION NO. A 00 CA 813 JN

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, DALE E. KLEIN, LARRY R. FAULKNER, SHELDON EKLAND-OLSON, BEN G. STREETMAN, NEAL E. ARMSTRONG, SHELDON LANDSBERGER AND J. PARKER LAMB, ("Defendants"), move this Court to dismiss certain of Plaintiff's claims, and, in support of their motion, state as follows:

1. In Paragraphs 5.1 and 5.2 of Plaintiff's Original Complaint, Plaintiff alleges that Defendants violated 42 U.S.C. §§1981 and 1983 as to Plaintiff's rights of free expression and his right to "make and enforce contracts to the same extent as White citizens".

2. Any such claims by Plaintiff against Defendant University of Texas (Austin campus) in this Court are barred by the Eleventh Amendment. *Pennhurst State School v.*

Halderman, 465 U.S. 88, 194 S.Ct. 900 (1990); Chacko v. Texas A&M University, 960 F. Supp. 1180, 1198 (S.D. Tex. 1997). Absent consent of the State of Texas for suit to be brought against the State or one of its agencies or departments, such as the University of Texas, it is proscribed by the State's sovereign immunity under the Eleventh Amendment. Tex. Educ. Code Ann. §65.02(a)(2) (Vernon 1994); Pennhurst, 465 U.S. at 100, 104 S.Ct. at 908; Chacko, 960 F. Supp. at 1198. .

3. The individual Defendants sued in their official capacities for claims under 42 U.S.C. §§1981 and 1983 are similarly protected by the Eleventh Amendment as to any monetary damages. Hafer v. Merlo, 502 U.S. 21, 24, 112 S.Ct. 358, 361, 116 L.Ed.2d 301 (1991); Chacko, 960 F. Supp. 1198 -1199.

4. In addition, States and agencies of the State, such as the University of Texas, are not "persons" who may be sued under 42 U.S.C §1983. Cheramie v. Tucker, 493 F.2d 586 (5<sup>th</sup> Cir. 1974), cert. den. 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107.

5. Plaintiff also alleges in Paragraphs 4.16, 4.36, and 5.3 of his Original Complaint that Defendants violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d by discriminating against him on the basis of race, Defendant University of Texas (Austin) being involved in a federally sponsored and funded program in which Plaintiff participated.

6. Plaintiff is precluded from pursuing a claim under Title VI for racial discrimination in employment. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, is the exclusive remedy for such employment discrimination. Lakoski v. James, 66 F.3d 751, 753-754 (5<sup>th</sup> Cir. 1995). Allowing an employment discrimination claim under Title VI would disrupt the remedial process crafted by Congress in Title VII. Lowrey v. Texas A&M University System,

117 F.3d 242, 254 (5<sup>th</sup> Cir. 1997).

WHEREFORE, Defendants pray this Court grant their Motion to Dismiss and award such other and further relief as the Court deems fair and just.

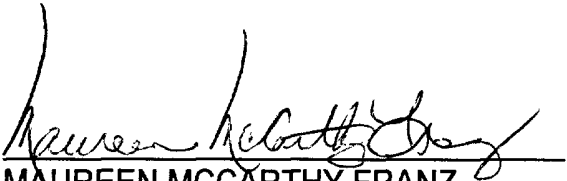
Respectfully submitted,

JOHN CORNYN  
Attorney General of Texas

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First Assistant Attorney General

JEFFREY S. BOYD  
Deputy Attorney General for Litigation

TONI HUNTER  
Chief, General Litigation Division


A handwritten signature in black ink, appearing to read "Maureen McCarthy Franz", is written over a horizontal line.

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ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been sent via certified mail, return receipt requested on May 4, 2001 to:

David T. Lopez  
David T. Lopez & Assoc.  
3900 Montrose Boulevard  
Houston, Texas 77006-4959

  
MAUREEN MCCARTHY FRANZ  
Assistant Attorney General

